

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD R. PEARSON,

Defendant-Appellant.

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UNPUBLISHED

August 26, 1997

No. 194784

Oakland Circuit Court

LC No. 95-141337

Before: Corrigan, C.J., and Markey and Markman, JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. The circuit court sentenced defendant to a term of imprisonment of four to ten years. We affirm.

Defendant's conviction arose from his attack on William Burnett at an apartment complex in Southfield in the early hours of September 9, 1995. When defendant attacked him, Burnett was leaving the apartment of Joyce McBride, with whom defendant had been romantically involved.<sup>1</sup>

I.

Defendant first argues that he was denied the effective assistance of counsel. Because a *Ginther*<sup>2</sup> hearing was not held, this Court is precluded from reviewing this claim "unless the record contains sufficient detail to support defendant's claims, and, if so, review is limited to the record." *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996). A presumption exists that defendant received effective assistance of counsel and defendant carries the heavy burden of proving otherwise. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). To show that he was denied the effective assistance of counsel, defendant must establish that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, that counsel's deficient performance was prejudicial to defendant and that, but for the error, the result would have been different. *Id.* Defendant "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995) (citation omitted). Prejudice does not exist unless the

court concludes that there is “a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.” *People v Pickens*, 446 Mich 298, 312; 521 NW2d 797 (1994) (citation omitted).

Defendant claims that counsel was ineffective for failing to introduce evidence that the police had searched defendant’s vehicle and found no traces of blood, yet noted that it did not appear to have been cleaned. Defendant argues that this evidence was highly exculpatory because the attacker probably would have been bloody after the assault. The police report upon which defendant bases this claim was not a part of the lower record. Therefore, we cannot review this contention. *Maleski, supra* at 523. Moreover, considering Burnett’s identification of defendant as his attacker, the jury could have found defendant guilty even if counsel had introduced the evidence.

Next, defendant claims that counsel was ineffective because he presented a defense that was irrelevant to the elements of the offense and that opened the door for the presentation of prejudicial evidence. Counsel proposed that defendant did not have a motive because he was on good terms with McBride at the time of the assault. Whether evidence is relevant depends on two factors: materiality and probative force. *People v Mills*, 450 Mich 61, 67; 537 NW2d 909, modified 450 Mich 1212 (1995). Evidence is material if it is related to a fact that is “of consequence” in the case. *Id.* Evidence need not relate to an element of the crime to be considered material. *Id.* Evidence has sufficient probative force if it has *any* tendency to “make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *Id.* at 68.

Defendant’s relationship with McBride was relevant in light of the prosecution’s theory that defendant assaulted Burnett because defendant was obsessed with McBride. It appears that defense counsel developed the challenged theory to show that McBride was seeing defendant voluntarily. Therefore, counsel’s presentation of proofs that defendant and McBride continued to see each other throughout the summer related to a fact of consequence to the case—whether defendant had a motive to assault Burnett. Counsel was not ineffective merely because the strategy apparently did not work. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

## II.

Next, defendant argues that he was denied a fair trial by the admission of irrelevant, prejudicial evidence. This Court is precluded from reviewing defendant’s claim absent manifest injustice because he failed to object at trial. *People v Burton*, 219 Mich App 278, 292; 556 NW2d 201 (1996). Manifest injustice is not present in this case because the challenged evidence properly was admitted at trial. Evidence that defendant placed a listening device in McBride’s mattress and entered her apartment uninvited was not introduced as proof of defendant’s bad character. Instead, it was admitted to show that defendant was obsessed with McBride. Therefore, MRE 404(b) does not bar its admission. *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). Moreover, the evidence was relevant to the prosecution’s theory that defendant’s obsession with McBride was his motive to attack Burnett. See *People v Miller (After Remand)*, 211

Mich App 30, 39; 535 NW2d 518 (1995). Finally, although the evidence was admittedly prejudicial, its probative value was not “substantially outweighed” by the danger of unfair prejudice. MRE 403.

Defendant also challenges the admission of evidence that he told McBride that she would “never have peace in another relationship” because he would “kill anybody that [she] saw.” This evidence properly was admitted because this threat “fit squarely within the stalker/obsessive theory” advanced by the prosecution. *Miller, supra* at 39. We are not persuaded by defendant’s attempt to distinguish this Court’s decision in *Miller*. Admittedly, defendant threatened to *kill* anyone whom McBride saw, yet he actually committed an *assault*. The circumstances of the assault, however, matched the circumstances of his threat. Therefore, the rule of *People v DeRushia*, 109 Mich App 419, 427; 311 NW2d 374 (1981), did not preclude admission of defendant’s statement in this case.

### III.

Defendant further argues that he was denied a fair trial because the prosecution introduced improper rebuttal evidence. Our Supreme Court has held that “the test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor’s case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant.” *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996).

McBride testified on rebuttal regarding defendant’s behavior during the months before the attack. She described numerous incidents where defendant used his key to enter her apartment at night without an invitation, followed her, and appeared uninvited at a family party. This evidence was responsive to defendant’s proofs because he testified on direct examination that he and McBride had continued to see each other amicably during those months. During cross examination, he specifically denied all the incidents that McBride described. Therefore, the prosecutor was entitled to introduce the rebuttal evidence to show the “actual state of their relationship . . . .” *Id.* at 399-400 (citation omitted). For these same reasons, the prosecutor’s questions did not comprise the improper technique of eliciting denials on cross examination to “facilitate the admission of new evidence.” *Id.* at 401.

### IV.

Next, defendant contends that he was denied a fair trial by the admission of evidence that he previously had been arrested for carrying a handgun without a permit. Defense counsel did not object to this evidence; therefore, this Court is precluded from reviewing this issue absent manifest injustice. *Burton, supra* at 292. Manifest injustice is not present in this case. After defendant volunteered that he was “not a violent person,” the prosecutor asked him whether, in light of this assertion, he had any reason to carry guns. The evidence of defendant’s arrest was not introduced until defendant inaccurately testified that he did not carry guns.<sup>3</sup> Under these circumstances, the prosecution permissibly introduced the evidence to correct this misimpression. See *People v Sutton (After Remand)*, 436 Mich 575, 598-599; 464 NW2d 276 (1990).

Defendant also asserts that the prosecutor improperly asked three of defendant’s character witnesses whether they had heard of his arrest for possessing the gun. The prosecutor’s inquiries about

the gun charge on cross examination were appropriate in light of the witnesses' testimony that defendant had a reputation as a peaceful person. See *People v McClow*, 40 Mich App 185, 195; 198 NW2d 707 (1972). Moreover, the trial court's instruction to the jury cured any possible prejudice. *People v Roupe*, 150 Mich App 469, 478-479; 389 NW2d 449 (1986).

#### V.

Defendant next argues that the testimony of Detective Simerly and the prosecutor's objection to defendant's closing argument improperly commented on defendant's exercise of his Fourth Amendment rights. No constitutional violation arose in this case. Unlike the case cited by defendant, *People v Stephens*, 133 Mich App 294, 298; 349 NW2d 162 (1984), the detective in this case did not testify that defendant had refused to consent to a search. Further, the prosecutor's objections did not refer to defendant's exercise of his Fourth Amendment rights.

#### VI.

Finally, defendant argues that he was denied a fair trial by numerous instances of prosecutorial misconduct. This Court reviews questions of prosecutorial misconduct on a case by case basis. The challenged remarks are considered in context and evaluated in light of arguments by defense counsel and their relationship to the evidence presented at trial. *People v Phillips*, 217 Mich App 489, 497; 552 NW2d 487 (1996). The test is whether defendant was denied a fair and impartial trial. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996).

Defendant contends that the prosecutor should not have attempted to use as evidence of guilt the fact that defendant chose to exercise his Fourth Amendment rights. The prosecutor, however, was unsuccessful in his attempt because the trial court sustained defendant's objection. Defendant was not denied a fair trial by this attempt.

Next, defendant asserts that the prosecutor's introduction of evidence that defendant previously had been arrested for carrying a handgun without a permit amounted to prosecutorial misconduct. As discussed, the prosecutor's questions were proper in light of defendant's assertion that he did not carry guns. We decline to review this unpreserved issue because no manifest injustice occurred. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Defendant next contends that the prosecutor improperly introduced evidence that defendant was an amateur boxer and that he had studied martial arts as proof that defendant was a violent person. Defendant did not object to either the allegedly improper argument or the admission of the evidence during direct examination of McBride. No manifest injustice would result if we decline to review this issue. McBride's testimony was relevant to whether defendant had the physical strength necessary to accomplish the brutal assault in this case. The prosecutor's argument was a permissible comment on the evidence. *People v Lee*, 212 Mich App 228, 255; 537 NW2d 233 (1995).

Defendant also attacks the prosecutor's questioning of his character witnesses on their awareness of his participation in boxing and martial arts. These questions properly were intended to test the credibility of the witnesses by exploring their definition of "peaceful." *McClow, supra* at 194-195.

Defendant further argues that the prosecutor mischaracterized the evidence when questioning his character witnesses. The prosecutor asked defendant's character witnesses whether they had heard that defendant had been assaultive toward McBride and whether they had heard that he had held her "captive" in her apartment. The prosecutor's questions accurately described the incidents to which McBride testified on rebuttal.

Finally, defendant argues that the prosecutor argued facts not in evidence. Defendant did not object to the prosecutor's comment. No manifest injustice would result if we declined to review this issue. The prosecutor was discussing the credibility of the character witnesses when he made the comment. Moreover, the trial court instructed the jury that the arguments of counsel were not evidence and that the verdict should be based on the evidence. These instructions cured any possible prejudice from the remark. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995).

The prosecution appears to concede that no evidence supported the statement that the gun belonged to defendant's father rather than a security company. Although the remark was improper, *Lee, supra* at 255, reversal is not required. Any prejudice from this argument was eliminated because, upon counsel's objection, the trial court immediately instructed the jury. Therefore, the remark did not deny defendant a fair trial. *Bahoda, supra* at 281.

Affirmed.

/s/ Maura D. Corrigan

/s/ Jane E. Markey

/s/ Stephen J. Markman

<sup>1</sup> Burnett and McBride each testified that they were not romantically involved.

<sup>2</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

<sup>3</sup> The prosecutor did not ask whether defendant had been arrested for carrying a gun; instead, he inquired about the incident that led to the arrest. Defense counsel actually mentioned that the incident was an arrest.